NO. 15, 882

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANNA VALETTA NOCITA, Claimant of One 1957 Ford Thunderbird Automobile, Motor No. D7FH116357, its tools and appurtenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

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Attorney for Appellant.

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TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

NO. 15,882

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Comes now the appellant above named and respectfully petitions this Honorable Court to grant a rehearing of her appeal herein, upon the following ground, to-wit: That the opinion of this Court as made and filed on August 5th, 1958, is in apparent conflict with the opinion of the Supreme Court of the United States in United States v. Calamaro, 354 U.S. 351, 77 S. Ct. 1138.

STATEMENT

In its opinion, this Court stated:

> "The fact that the subject Thunderbird automobile was not shown to have been used to 'accept wagers' but only to collect the winnings of previous wagers does not preclude this court from holding that the car was used as an active aid in violating the internal revenue laws. The receiving of winnings and the paying of losses by a principal are integral parts of the business of accepting wagers . . . "

Assuming, but not conceding, that this is a correct statement of the law, it must nevertheless be determined when "the receiving of winnings and the paying of losses" by the principal, Nocita, actually took place. Vincelli, as the agent of Nocita, had received the winnings and paid the losses, and, in legal contemplation, Vincelli's acts, as agent, were the acts of Nocita, as principal. The wagering contracts, including the receiving of winnings and the paying of losses, were therefore completely consummated without any use of the forfeited automobile, thus bringing the instant case squarely within the following language of the Supreme Court in United States v. Calamaro, supra:

> "The nub of the Court of Appeals' holding was put in the following language, with which we agree:
>
> 'In normal usage of familiar language, "receiving wagers" is what someone on

the "banking" side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other.' (The court here referred to the definition of 'wager' contained in §3285(b) (1) (D); note 1, supra.) Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes -- and in an appropriate case no doubt would insist -- that what the writer does in relation to the bettor amounts to "receiving a wager" . . . . . '

" . . . . In other words, we think that as used in §3290 the term 'receiving' a wager is synonymous with 'accepting' a wager; that it is the making of the gambling contract, not the transportation of a piece of paper, to which the statute refers . . . " (Emphasis added.)

The fact that the transactions with the bettors had been fully completed without involving the use of the forfeited automobile distinguishes the instant case from the cases of U. S. v. General Motors Acceptance Corp., (where lottery tickets were being transported to the place where they were to be distributed and sold) and U. S. v. One 1953 Oldsmobile (D. C., 1955) 132 F. Supp. 14 (where the car was used in receiving winnings and paying losses to the bettors individually,

which transactions were part of the wagering contract.) In the instant case, the automobile was not used either to prepare for subsequent wagering or to receive winnings from, or pay losses to, the bettors involved. Thus, if this Court's opinion that "the receiving of winnings and the paying of losses" is an integral part of the gambling transaction is correct, nevertheless the evidence here falls short of proof that the automobile was used therein.

CONCLUSION

It is respectfully urged that a rehearing be granted for the purpose of considering the aspect of the agency of Vincelli in the light of United States v. Calamaro, supra.

Respectfully submitted,

WALTER M. CAMPBELL

Attorney for Appellant

It is hereby certified that in my opinion and judgment this Petition for Rehearing is well founded, and it is not interposed for delay.

WALTER M. CAMPBELL

Attorney for Appellant